

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LIFE AFTER HATE, INC., a/k/a EXITUSA,

Plaintiff/Counter-Defendant,

v.

FREE RADICALS PROJECT INC. and
CHRISTIAN PICCIOLINI,

Defendants/Counter-Plaintiffs.

Case No. 18-cv-06967

Hon. Virginia M. Kendall

Magistrate Judge Jeffrey Cole

MOTION FOR DISCOVERY SANCTIONS

Plaintiff Life After Hate, Inc. a/k/a EXITUSA (“Plaintiff”), by and through its undersigned counsel, and in support of its Motion for Discovery Sanctions, provides the following:

INTRODUCTION

After expedited discovery closed, testimony proffered by Defendant Christian Picciolini during the subsequent preliminary injunction hearing, combined with the Court’s factual findings and other evidence, established that Defendants provided false discovery responses, gave perjured deposition testimony, and withheld important documents during expedited discovery. This Motion seeks relief for Defendants’ sweeping discovery misconduct.

BRIEF BACKGROUND

Plaintiff is a non-profit organization that provides educational services and social services to help individuals leave and stay out of hate organizations—primarily under the “LIFE AFTER HATE” and “EXITUSA” federally registered marks. Defendant Christian Picciolini, a former Board member and officer of Plaintiff, was removed from Plaintiff’s Board and ultimately terminated from the organization in 2017. After his termination, Defendant Picciolini misappropriated Plaintiff’s domain name (www.exitusa.org), Plaintiff’s social media accounts (the

Life After Hate and ExitUSA YouTube channels), Plaintiff's Twitter account (@exitusateam), and Plaintiff's videos. He then proceeded to hold himself as the source and provider of the ExitUSA program—or as otherwise affiliated with Plaintiff.

Plaintiff filed suit against Defendant Picciolini and his organization Free Radicals Project Inc. in October of 2018; Plaintiff also filed a Motion for Preliminary Injunction. *See* Dkt. Nos. 1, 7-8. Over the next four months, the parties engaged in extensive expedited discovery for the purpose of preparing for the preliminary injunction hearing. *See* Dkt. No. 19. On February 7, 2019 and then again on February 13, 2019, Plaintiff filed motions to compel related to a limited number of pressing discovery issues.¹ Dkt. Nos. 55, 64. After hearings on each of these motions, Magistrate Judge Cole granted Plaintiff's motions to compel in regard to several discovery requests. *See* Dkt. Nos. 59, 66. During the final week of February in 2019, Judge Kendall held a three-day hearing on Plaintiff's Motion for Preliminary Injunction. Defendants testified at this hearing. In late 2019, Judge Kendall issued a written order granting Plaintiff's Motion for a Preliminary Injunction, which includes several findings of fact. *See* Dkt. No. 137.

Based on Defendant Picciolini's deposition and hearing testimony, the Court's factual findings set forth in its Ruling, and other evidence, it is clear that Defendants provided false discovery responses and perjured deposition testimony, intentionally withheld other discovery, and, deliberately delayed providing other responses and documents during expedited discovery.

RULE 37.2 STATEMENT

Plaintiff's counsel (Mr. Matt Grothouse) met and conferred with Defendants' former counsel (Mr. Michael Jacobson) by telephone on January 30, 2019. Further, on February 5, 2019,

¹ Plaintiff's two emergency motions to compel were limited in scope and addressed only specific discovery needed to conduct a deposition that was scheduled for the *day after* the first motion to compel hearing, and to litigate the preliminary injunction hearing scheduled for days after the second motion to compel hearing.

Plaintiff's counsel sent Defendants' attorney a follow-up letter to their January 30th meet-and-confer phone conference, which detailed Defendants' continued discovery deficiencies. On February 11, 2019, Defendants sent a letter confirming they stood by their discovery deficiencies.

LEGAL STANDARD

"In accordance with Rule 37 of the Federal Rules of Civil Procedure and the inherent powers of the Court, the Court has discretion to impose discovery sanctions, such as fee awards, costs, evidentiary presumptions and exclusions, and dismissal of claims." *Urban v. United States*, 98 A.F.T.R.2d 2006-5792, 2006 WL 2037354, at *9 (N.D. Ill. July 14, 2006) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991)). "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980) (internal citations omitted).

"Rule 37(a)(4) treats an evasive and incomplete answer in discovery as equivalent to no answer, and thus a failure to comply with court-ordered discovery." *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 775-76 (7th Cir. 2016). The Seventh Circuit has also "construed the sanctioning power conveyed by Rule 37 to extend to instances of a party hiding evidence and lying in his deposition." *Id.* at 776 (citing *Negrete v. Nat'l R.R. Passenger Corp.*, 547 F.3d 721, 723-24 (7th Cir. 2008)). Rule 37 sanctions are appropriate where a party acted with "either willfulness, bad faith, or fault" in violating his discovery obligations. *Marrocco v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir.1992). Willfulness or bad faith may be inferred through a party's "pattern of contumacious conduct or dilatory tactics," *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1383 (7th Cir.1993), and "fault" is established when a party's discovery conduct demonstrates objectively a lack of reasonableness. *Marrocco*, 966 F.2d at 224 (explaining that in the context of

Rule 37 sanctions, “fault” refers to “the reasonableness of the conduct-or lack thereof-which eventually culminate [s] in the violation”). “Fault, in contrast to willfulness or bad faith, does not require a showing of intent, but presumes that the sanctioned party was guilty of ‘extraordinarily poor judgment’ or ‘gross negligence’ rather than mere ‘mistake or carelessness.’” *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016) (quoting *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992)); *see also Long v. Steepro*, 213 F.3d 983, 987 (7th Cir. 2000) (stating that “[f]ault in this context suggests objectively unreasonable behavior”).

Additionally, “[b]eyond any rule-based justification, the court’s inherent authority to rectify abuses to the judicial process also authorizes sanctions for certain violations. *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991)). “[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.” *Id.* at 49. A court’s inherent authority allows the court to exact the following sanctions for discovery violations: (1) dismissal of a party’s claim, (2) a fine, and (3) the moving party’s costs and attorneys’ fees related to the sanctionable conduct. *See Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003) (recognizing dismissal as an appropriate sanction based on the court’s inherent authority); *see also Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir.2003) (recognizing that fines are “among the tools available to trial courts to remedy the harms of discovery violations”).

ARGUMENT

During the parties’ preliminary injunction-based expedited discovery, Defendants provided falsified discovery responses and perjured deposition testimony in violation of Rule 26, the Court’s discovery orders, and 18 U.S.C. § 1621. Furthermore, Defendant refused to provide and intentionally withheld numerous responses and documents while also materially delaying providing other discovery responses and production. These discovery violations were willful (or

at the very least grossly negligent), permeated the entire expedited discovery, materially impeded Plaintiff's ability to support its preliminary injunction motion, and caused Plaintiff to incur extensive and otherwise unnecessary costs and attorneys' fees in preparing for the preliminary injunction hearing. Worse, while engaging in this sanctionable discovery conduct, Defendants filed multiple counterclaims and third-party claims premised largely on evidence Defendants intentionally withheld and falsified during the expedited discovery. The Court should order serious sanctions against Defendants, including the dismissal of Defendants' third-party claims and counterclaims, a substantial fine, and/or the payment of Plaintiff's costs and attorneys' fees.

I. DEFENDANT ENGAGED IN EXTENSIVE SANCTIONABLE CONDUCT DURING EXPEDITED DISCOVERY.

Plaintiff served Defendants with discovery requests (Requests for Production, Requests for Admission, and Interrogatories) on November 19, 2018 to prepare for the preliminary injunction hearing scheduled for (and ultimately commencing) on February 22, 2019. Throughout the next three months, however, Defendants engaged in sweeping discovery misconduct that continued up to the eve of the preliminary injunction hearing and involved issues and evidence at the heart of that hearing. The Court should sanction Defendants for their widespread discovery misconduct.

A. Defendants Provided False and Perjured Responses to Plaintiff's Requests for Admission and Interrogatories.

During expedited discovery, Defendants—in violation of Rule 26 and the Court's discovery orders—knowingly submitted false responses to Plaintiff's Interrogatories and Requests for Admissions. Specifically, Defendants provided the following false discovery responses:

In his Responses to Request for Admission, Defendant Picciolini falsely denied that he Director of Life After Hate, Inc. from August of 2011 to November of 2012 (RFA No. 2) but then later admitted this during his hearing testimony. Prelim. Inj. Hr'g Tr. vol. 2, 279:30-280:03. He

also falsely denied that he was the Executive Board Chair of Life After Hate, Inc. from November 2012 to Spring of 2015 (RFA No. 3) but then admitted this his hearing testimony. Picciolini Dep. 62:05-12; 259:20-260:05. Defendant Picciolini also falsely stated he was “program director [of ExitUSA] from time ExitUSA concept began” (RFA No. 5) but then later admitted he was only made Program Director after he stepped down from Life After Hate, Inc.’s Board in April of 2017. Prelim. Inj. Hr’g Tr. vol. 2, 280:12-13. He also falsely denied that Plaintiff paid for the <www.exitusa.org> domain name (RFA No. 6) but then admitted this during his hearing testimony that Plaintiff did pay \$500 for it. Prelim. Inj. Hr’g Tr. vol. 1, 220:20-23; (Dkt. No. 137, at 6-7. Further, he falsely denied that he redirected the domain name <www.exitusa.org> to www.freeradicals.org for several months (RFA No. 11) but then admitted to this redirection. *See* Prelim. Inj. Hr’g Tr. vol. 2, 255:14-17. These facts were key to establishing how and why the ExitUSA program and trademark were created, Plaintiff’s ownership of the at-issue trademarks and websites, and Defendant Picciolini’s intent to copy Plaintiff’s mark and steal its domain name.

Additionally, Defendant Picciolini falsely denied that Plaintiff suspended him as Program Director of ExitUSA in 2017 (RFA No. 29) but then admitted this fact during his hearing testimony. Prelim. Inj. Hr’g Tr. vol. 1, 216:02. He also falsely denied that he was terminated from his position as Program Director of ExitUSA and then from Plaintiff at the end of August of 2017 (RFA No. 30), but then admitted this during his hearing testimony. Prelim. Inj. Hr’g Tr. vol. 2, 281:12-14; Prelim. Inj. Hr’g Tr. vol. 1, 222:02.² Defendant Picciolini further falsely denied that he was an officer of Plaintiff when he transferred the <www.exitusa.org> domain name from Life After Hate, Inc.’s GoDaddy account to his personal account (RFA No. 39), but then admitted this. Prelim. Inj. Hr’g Tr. vol. 1, 220:20-23. He also falsely denied that he promised he would return

² The Court also found that Plaintiff’s Board “terminated Picciolini from LAH.” Dkt. No. 137, at 8.

control of the www.exitusa.org domain to Life After Hate, Inc. after he resigned from Life After Hate, Inc.'s Board in April of 2017 (RFA No. 42), but then admitted this during his hearing testimony. Prelim. Inj. Hr'g Tr. vol. 1, 221:21-25. Finally, Defendant Picciolini falsely denied that Free Radicals Project Inc. provides services in the same areas as Plaintiff (RFA No. 45), but then admitted to providing services in the same area as Plaintiff this during his deposition. *See* Picciolini Dep. 207:18-208:08.

Furthermore, Defendant Free Radicals Project Inc. ("Defendant FRP") falsely denied that it advertised educational and social services on its website (RFA No. 8), but then admitted that it promotes educational and social services on its website www.freeradicals.org. Picciolini Dep. 207:18-208:08. It also falsely denied that it had controlled the ww.exitusa.org domain name since at least May of 2018 (FRA No. 12), but then admitted that its Principal and CEO had control over the domain name since 2016, and that he redirected the domain name to Defendant FRP's website. Prelim. Inj. Hr'g Tr. vol. 1, 220:20-23; Prelim. Inj. Hr'g Tr. vol. 3, 466:14-25. Defendant FRP also falsely denied that it ever held itself out as the company formally known as "ExitUSA" (RFA No. 14), but then admitted that its Principal and CEO operated the @exitusateam and changed the name of the handle to read "ExitUSA is now@FreeRadicalsOrg" and that he caused the www.exitusa.org domain name to www.freeradicals.com. Prelim. Inj. Hr'g Tr. vol. 1, 257:17-258: 19; Prelim. Inj. Hr'g Tr. vol. 3, 466:14-25). The organization also falsely denied that it "used the term 'ExitUSA' on its social media" (RFA No. 15) but then admitted to using the Twitter handle @exitusateam and changing the Twitter handle to state "ExitUSA is now @FreeRadicalsOrg." Prelim. Inj. Hr'g Tr. vol. 1, 227:22-228:24. It also intentionally did not list the @exitusateam Twitter account or any YouTube accounts in its Response to Plaintiff Interrogatory No. 5 (which asked Defendant FRP to list all of the social media accounts that it has

ever used), but then during the hearing its CEO admitted to changing the @exitusateam Twitter handle to read “ExitUSA is now@FreeRadicalsOrg” and posting material for Defendant FRP on that Twitter account. Prelim. Inj. Hr’g Tr. vol. 1, 257:17-258:19). Finally, Defendant FRP intentionally did not identify several instances where it used the phrase “Life After Hate” and “ExitUSA,” including its use of the exitusa.org domain name, its use of “ExitUSA” on the @exitusateam Twitter account, its use of the phrase “Life After Hate” on its Homepage (www.freeradicalsproject.org), its use of the phrase “Life After Hate” on its About Us Page, and its use of the www.exitus.org domain name. *See* Dkt. 137, at 9-10.

Defendants’ false discovery responses materially impaired Plaintiff’s ability to prepare for and litigate the preliminary injunction hearing and materially increased Plaintiff’s expenses.

B. Defendants Provide Perjured Deposition Testimony.

Defendants, in violation of 18 U.S.C. § 1621, provided perjured deposition testimony.

First, during his deposition Defendant Picciolini stated he did not remember ever redirecting the domain www.exitusa.org to www.freereadicals.org. Picciolini Dep. 176-177). During his hearing testimony, however, he testified that he redirected the domain www.exitusa.org to www.freereadicals.org and even explained why he did. *See* Prelim. Inj. Hr’g Tr. vol. 2, 255:14-17. Second, during his deposition, Defendant Picciolini stated he was the “sole creator” of the tagline “No Judgment, Just Help.” (Picciolin Dep. 125:2-9); however, then testified that Gravity Tank (a marketing company) ultimately created the “No Judgment. Just Help.” tagline. *See* Prelim. Inj. Hr’g Tr. vol. 2, 360-61:24-16.³ Third, during his deposition, Defendant Picciolini stated that Free Radicals Project Inc. did not use any YouTube Pages (Picciolini Dep. 130:7-10); however, he later testified that he uploaded a video on YouTube for Free Radicals Project Inc. *See* Prelim.

³ The Court found that Gravity Tank helped Plaintiff to create the tagline as well. *See* Dkt. No. 137, at 6.

Inj. Hr'g Tr. vol. 1, 227:22-228:24. Fourth, Defendant Picciolini stated during his deposition that he formed the Wisconsin Life After Hate, Inc. entity with Arno Michaelis (Picciolini Dep. 28:06-09); however, the corporate filings demonstrate (and the Court found) that “[Mr.] Michaelis and two others, Robert T. Hasselkus and Jeff Percy, formed a Wisconsin nonstock corporation called Life After Hate, Inc.” in 2010 and that Defendant Picciolini did not form the entity. *See* Dkt. No. 137, at 4. Fifth, during his deposition, Defendant Picciolini stated that Life After Hate, Inc. did not profit off of any of Arno’s book (Picciolini Dep. 45: 1-6), but then he testified that Life After Hate, Inc. received money from Arno’s book. *See* Prelim. Inj. Hr'g Tr. vol. 1, 186:03-09.

Defendants false deposition testimony violated the Rule 26, multiple Court’s orders, and 18 U.S.C. § 1621. It also materially impaired Plaintiff’s ability to prepare for and litigate the preliminary injunction hearing and materially increased Plaintiff’s litigation expenses. *See Rivera v. Drake*, 767 F.3d 685, 686 (7th Cir. 2014) (“[P]erjury is among the worst kinds of misconduct.”).

C. Defendants Refused to Respond to Plaintiff’s Discovery Requests and Withheld Documents.

In violation of Rule 26 and three separate Court Orders, Defendants refused to provide important discovery responses to, and withheld vital production from, Plaintiff.

Specifically, Defendant FRP intentionally withheld documents and other production responsive to Plaintiff’s Requests for Production Nos. 4, 6, 8, 10, 11, which requested documents relating to Defendants’ services, advertising, fundraising, and social media access. This discovery was needed to establish the nature of Defendant FRP’s services, its clients, and its fundraising (key parts of the trademark infringement analysis at the heart of the preliminary injunction hearing).

Furthermore, Defendant Picciolini withheld production responsive to Plaintiff’s Request for Production No. 8, failed to provide a good-faith response to Plaintiff’s Interrogatory No. 4, and did not provide responsive answers to Plaintiff’s Requests for Admission Nos. 13, 18, and 47.

This evidence was crucial for establishing when Defendant Picciolini took Plaintiff's assets, what Defendants did with them, and who worked for Defendant Free Radical Project Inc.

D. Defendants Deliberately Delayed Providing Discovery.

Finally, Defendants deliberately delayed providing discovery responses and production in several important instances. First, for six weeks after the discovery response deadline, Defendant FRP refused to produce documents responsive to Plaintiff's Requests for Production Nos. 3, 4, 5, 6, 11, 18, which requested discovery relating to Defendants' communications, website analytics, public events, interventions, funding and revenue. This production was needed to establish the nature of Defendant FRP's services, understanding Defendant FRP's marketing and advertising, establishing who donated to Defendant FRP, establishing where and to whom Defendant FRP provides services, and establishing any consumer confusion—which were all central to Plaintiff's trademark infringement claim and Plaintiff's requested preliminary injunction.

Together, Defendants' deliberate discovery delays forced Plaintiff to file two motions to compel, delayed Plaintiff's receipt of important responses and production until just days before the preliminary injunction hearing, and prevented Plaintiff from being able to follow up on Defendants' additional discovery deficiencies in time for the preliminary injunction hearing. Finally, Defendants' deliberate discovery delays cost Plaintiff thousands of dollars in otherwise preventable costs and attorney's fees. *See Urban v. United States*, 98 A.F.T.R.2d 2006-5792, 2006-2 USTC P 50490, 2006 WL 2037354, at *9 (N.D. Ill. July 14, 2006) ("Plaintiff was harmed by the [Defendant's] lack of diligence and is entitled to an award of certain fees and costs."); *see also Illinois Tool Works, Inc. v. Metro Mark Prod., Ltd.*, 43 F. Supp. 2d 951, 960 (N.D. Ill. 1999) (emphasizing that "a party may not avoid sanctions merely by producing the documents after a motion has been filed" because that "would defeat the purpose of the rules").

II. APPROPRIATE SANCTIONS

“Rule 37 sanctions may include an order to pay the amount of the reasonable expenses incurred in making the motion for sanctions, including attorney’s fees.” *Houston v. C.G. Sec. Servs., Inc.*, 820 F.3d 855, 859 (7th Cir. 2016) (citing Fed.R.Civ.P. 37(b)(2)(C)). Also among the approved Rule 37(b) sanctions, is “dismissing the action or proceeding or any part thereof.” FED. R. CIV. P. 37(b)(2)(C); *Halas v. Consumer Servs., Inc.*, 16 F.3d 161, 164 (7th Cir.1994); *Dotson*, 321 F.3d at 667; *Urban v. United States*, 98 A.F.T.R.2d 2006-5792, 2006-2 USTC P 50490, 2006 WL 2037354, at *9 (N.D. Ill. July 14, 2006) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991) (“In accordance with Rule 37 of the Federal Rules of Civil Procedure and the inherent powers of the Court, the Court has discretion to impose discovery sanctions, such as fee awards, costs, evidentiary presumptions and exclusions, and dismissal of claims.”)).

Likewise, courts have the inherent authority to sanction a party for discovery misconduct, which include (1) monetary relief, (2) fines (*Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir.2003) (recognizing that fines are “among the tools available to trial courts to remedy the harms of discovery violations”), and (3) the “power to dismiss for discovery violations.” *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003). This power is “permissibly exercised not merely to remedy prejudice to a party, but also to reprimand the offender and to deter future parties from trampling upon the integrity of the court.” *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 797 (7th Cir. 2009) (internal quotation marks omitted). Such sanctions are appropriate when “there is a record of delay” or “contumacious conduct.” *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003).

Here, as established in detail above, there is a clear record of Defendants’ deliberate delay, as well as their contumacious conduct. Defendants falsified several discovery responses and provided perjured testimony that was material to the preliminary injunction hearing. Defendants also deliberately delayed and in some instance entirely withheld other important discovery

documents and responses. The discovery responses, production, and testimony that Defendants falsified, withheld, and/or delayed directly related to facts underlying Defendants' counterclaims and third-party claims. Accordingly, because Defendants' sanctionable conduct is both willful and widespread, because it involved both documented delay and contumacious conduct, because Defendants' misconduct materially impaired Plaintiff's ability to present and prove its case at the preliminary injunction hearing, and because Defendant's misconduct improperly aided their counterclaims and third-party claims, the Court should sanction Defendants by dismissing Plaintiff third-party claims and counterclaims, substantially fine Defendants, and/or order Defendants to pay Plaintiff's costs and attorney's fees incurred during expedited discovery.

A. The Court Should Dismiss Defendants' Third-Party Claims and Counterclaims.

The sanction of dismissal "must be available" to "not merely penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003). "[I]ncomplete or evasive responses to interrogatories can support, in part, dismissal of the entire action under Rule 37(b)." *Dotson*, 321 F.3d at 667 (citing *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175, 1180 (7th Cir.1987)). Additionally, "dismissal pursuant to the court's inherent authority can be appropriate when the plaintiff has abused the judicial process by seeking relief based on information that the plaintiff knows is false." *Flextronics Int'l, USA, Inc. v. Sparkling Drink Sys. Innovation Ctr. Ltd.*, 230 F. Supp. 3d 896, 907–08 (N.D. Ill. 2017). "As a fraud on the court, perjury may warrant the sanction of dismissal." *Id.* (quoting *Montano*, 535 F.3d at 564). The district court need only "find that the responsible party acted or failed to act with a degree of culpability that exceeds simple inadvertence or mistake before it may choose dismissal as a sanction for discovery violations." *Ramirez*, 845 F.3d at 776. "[I]t is axiomatic that the

appropriateness of lesser sanctions need not be explored if the circumstances justify imposition of the ultimate penalty—dismissal with prejudice.” *Dotson*, 321 F.3d at 667,

Here, while engaging in discovery misconduct, Defendants filed third-party claims and counterclaims based on evidence that Defendants falsified, withheld, and deliberately delayed providing. Specifically, Defendant Picciolini gave false testimony about how the at-issue videos were made and who paid for the videos. *Compare* Picciolini Dep. 135:02-03, 249:06:16 with Dkt. No. 137, at 7. Yet, Defendant Picciolini brought a copyright infringement counterclaim (Count I) and right of publicity counterclaim (Count III) that centers on the ownership of the videos. Defendants also withheld evidence (emails) pertaining to individuals who allegedly falsely associated Mr. Picciolini with Plaintiff while also delaying to provide or entirely withholding information and evidence about the creation, ownership, and use of the EXITUSA and LIFE AFTER HATE marks, the www.exitusa.org domain name, and the four videos. At the same time, Defendants brought counterclaims against Plaintiff for unfair competition (Count III), unjust enrichment (Count IV), conversion (V), tortious interference with a business expectancy (Count VI), and deceptive trade practices (Count IX) based on the ownership and use of the marks, the domain name, the videos, and a clip from one of the videos. Defs.’ Am. Countercls., Dkt. No. 128 (“Dkt. No. 128”). Further, Defendant Picciolini provided false testimony regarding how and why he was removed from Plaintiff’s Board. *Compare* Dep. 116:24-117:08 (Defendant Picciolini falsely stating that he resigned from Plaintiff’s Board “with the stipulation of eventually [the ExitUSA program] would be spun off”) with Dkt. No. 137, at 24 (finding that Plaintiff “twice refused” to “spin off ExitUSA”). Yet, Defendant Picciolini brought third-party claims for “civil conspiracy” (Count VII) based on alleged wrongful termination from Plaintiff’s Board. Finally, Defendants delayed, withheld, and falsified discovery pertaining to (i) when and where Defendants

provided intervention services, (ii) whether Defendant Picciolini was a licensed counselor, and (iii) the nature of Defendant Picciolini's statements about Donald Trump; yet, Defendant Picciolini brought a defamation claim (Count VIII) that centers on those very facts.

In short, all nine of Defendants' claims in its Second Amended Complaint involve evidence and testimony that Defendants falsified, withheld, and deliberately delayed during expedited discovery. Therefore, the most appropriate sanction for Defendants' misconduct in this case is for the Court to, among other things, dismiss Defendants' third-party claims and counterclaims. *See Dotson v. Bravo*, 321 F.3d 663, 667–68 (7th Cir. 2003); *see also Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Amers. LLC*, 516 F.3d 623, 627 (7th Cir. 2008) (affirming dismissal of a company's claims as a sanction for the CEO's misconduct in litigation). Accordingly, the Court should dismiss Defendants' third-party claims and counterclaims with prejudice as a sanction for Defendants' extensive and flagrant discovery misconduct.

B. Additionally, or in the Alternative, the Court Should Award Plaintiff its Costs and Attorneys' Fees Incurred During Expedited Discovery.

Because Defendants' misconduct "permeated and infected the discovery process," the Court should order Defendants to pay for *all* of Plaintiff's efforts to "gather information and evidence" to support its preliminary injunction motion. *Houston v. C.G. Sec. Servs., Inc.*, 302 F.R.D. 268, 282 (S.D. Ind. 2014), *aff'd*, 820 F.3d 855 (7th Cir. 2016). "By requiring [Defendants] to pay for all of the efforts by [Plaintiff] throughout discovery, the sanction captures the nature and essence of the misconduct by [Defendants], reflects a strong condemnation of the misconduct by the court, and provides some meaningful relief to [Plaintiff]." *Id.* Here, Plaintiff was forced incur a total of \$4,583.72 costs and \$69,878 in attorneys' fees related to expedited discovery (but not yet including the costs and fees related to this Motion).

C. Alternatively, the Court Should Award Plaintiff's Its Cost and Attorney's Fees Incurred in Bringing its Two Motion to Compel, Expending Additional Time and Resources in Establishing It Case, and Bringing this Motion.

At a minimum, the Court should order Defendants to pay Plaintiff's costs and attorneys' fees related to Defendants' discovery violations, which are numerous. *See Urban v. United States*, 98 A.F.T.R.2d 2006-5792, 2006 WL 2037354, at *11 (N.D. Ill. July 14, 2006) (awarding Plaintiff a total of \$273,530.45 for the costs and fees Plaintiff incurred that were "directly related to discovery violations"). Here, Plaintiff incurred \$10, 832.50 in attorneys' fees related to drafting, filing, and arguing its two motions to compel and drafting and filing this motion (but not yet including the costs and fees related to drafting, filing, and litigating this Motion).

CONCLUSION

Defendants' discovery misconduct should not "go unpunished." *Houston v. C.G. Sec. Servs., Inc.*, 302 F.R.D. 268, 281 (S.D. Ind. 2014), *aff'd*, 820 F.3d 855 (7th Cir. 2016). Defendants' conduct is sweeping, flagrant, and indefensible. "Intentional or not, defendants' missteps in the discovery phases of this case . . . are too numerous to escape sanction." *Frazier v. Layne Christensen Co.*, 486 F. Supp. 2d 831, 846 (W.D. Wis. 2006). The Court should not permit Defendants to bring third-party claims and cross claims based on the very evidence they have improperly withheld and provided perjured testimony. At the very least, Defendants' conduct "warrants a substantial monetary sanction." *Id.* Such sanctions are necessary to "curtails the ability of litigants to use legal processes to heap detriments on adversaries (or third parties) without regard to the merits of the claims." *Rickels v. City of South Bend*, 33 F.3d 785, 787 (7th Cir.1994).

DATED: March 4, 2020

Saper Law Offices, LLC
505 N. LaSalle, Suite 350
Chicago, IL 60654
Office: 312.527.4100

Respectfully submitted,

/s/ Matthew R. Grothouse
Matthew R. Grothouse
ARDC # 6314834
matt@saperlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 4, 2020 the foregoing

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was filed with the Clerk of Court using the CM/ECF system, which will then send a notification of such filings to Defendants' counsel of record.

I certify that all parties in this case are represented by counsel who are CM/ECF participants.

/s/ Matthew R. Grothouse
Matthew R. Grothouse

Attorney for Plaintiff